IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORIGINAL SIDE

APPEAL NO.841 OF 2005
IN
CHAMBER SUMMONS NO.913 OF 2004
IN
SUIT NO.3505 OF 1991

FGP Limited ... Appellant
vs.
Saleh Hooseini Doctor & anr. ... Respondents

Mr.Ulhas G. Kerkar with Mr.S.S.Deshmukh i/b. M/s.Desai & Chinoy for the appellant.

Mr.D.J.Khambatta with Mr.Rohit Kapadia & Mr.Kalpesh Joshi i/b. M/s.M.Ranchhoddas & Co. for the respondents.

CORAM : R.M. LODHA &
D.G. KARNIK, JJ.

DATED : 17th November 2005

P.C.

Heard.

2. The plaintiff is in appeal aggrieved by the order dated 20.4.2005 whereby the learned Chamber Judge dismissed the Chamber Summons taken out by the plaintiff seeking amendment in the plaint.

3. The plaintiff filed the Suit for specific performance of the Contract executed on or about 20th July 1981 (Exhibit A to the plaint) and in the alternative the decree in the sum of Rs.1.50 crores and some other reliefs.

4. The details of the agreement of which specific performance is sought are set out in paragraph 3 and 4 of the plaint. In paragraph 2 of the plaint it is averred that by a Deed of Lease executed on 16th July 1981 the defendant granted monthly tenancy to the plaintiffs of the premises mentioned in para 1 of the plaint and that the plaintiffs kept a deposit with the defendant in the sum of Rs.5 lacs by way of security deposit. The agreement of which specific performance is sought was executed thereafter. The Suit was filed on 10.10.1991. The defendant has traversed the plaint by filing written statement on 9.3.1993.

5. By the chamber summons taken out on 23rd June 2004 the plaintiff prayed for amendment in terms of the schedule annexed thereto. By proposed amendments, the plaintiff sought to insert paragraph 1A to 1G in the plaint after para 1. The proposed paragraphs 1A to 1G read thus:

> "1A. The plaintiff states and submits that originally one Mahendra Singh and Arvind Singh, sons of Bhagat Singh and Karta of the Hindu Undivided Family of Mahendra Singh of Udaipur were the owners of the said premises. The plaintiffs submit that the plaintiffs ever since then were in occupation, use and enjoyment of the said premises as the tenant of the said Mahendra Singh and others. These facts have been admitted by the defendants in para 2 of their Plaint in the Small Causes Court Suit being R.A.E.Suit No.127/338 of 1991 where they were the plaintiffs. The plaintiffs crave leave

to refer to and rely upon the said statement/suit as and when produced.

1B. The plaintiff states and submits that the said Mahendra Singh and others sold the said premises to one Mrs.Sheroo Hooseini Doctor under a Deed of Apartment dated 12th January 1981. On the day when the said premise was sold to her, the plaintiffs were already sitting tenants of the said Mahendra Singh and others.

1C. The plaintiff further states and submits that Mrs.Sheroo Hooseini Doctor since deceased, after having become the owner of the said premises in January 1981 agreed to sell the said premises to the plaintiffs by entering into an Agreement of Sale dated 14th July, 1981. Hereto annexed and marked Exhibit A-1 is the copy of the said Agreement of Sale dated 14th July, 1981.

1D. The plaintiff further respectfully state and submit that pursuant to the said Agreement of Sale dated 14th July, 1981, the plaintiffs paid the entire consideration amount of Rs. 5 lakhs (Rupees Five lakhs only) mentioned therein to Mrs.Sheroo Hooseini Doctor the original Defendant. However, Mrs.Sheroo Hooseini Doctor failed and neglected to execute the final Deed of Transfer in favour of the plaintiffs pursuant to the Agreement of Sale dated 14th July, 1981. The plaintiffs have by their letter dated 14th July, 1981 informed the original defendants that as per the Agreement of Sale dated 14th July, 1981, they were enclosing their cheque also dated 14th July, 1981 for Rs.5 lakhs (Rupees Five Lakhs only), but through oversight they had mentioned the word "Tenancy Agreement" instead of "Agreement of Sale". The same was a genuine and bonafide mistake on the part of the plaintiffs. The plaintiffs have thereafter by their letter dated 8th April, 1982, 13th April, 1983, 9th April, 1984, 21st April, 1988 and 15th April, 1992 called upon the original defendants to confirm the fact of Rs. 5 lakhs (Rupees Five lakhs only) having been paid

to and/or deposited with them as per the said Agreement of Sale dated 14th July 1981. Hereto annexed and marked Exhibit A-2 (collectively) are copies of the letters dated 14th July, 1981, 8th April, 1982, 13th April,1983, 9th April, 1984, 21st April, 1988 and 15th April, 1992 addressed by the plaintiffs to the original Defendants.

1E. The plaintiff states and submits that under the said Agreement of Sale dated 14th July 1981, one of the terms of the sale was that the sale could be completed after 3 years of the Agreement. Keeping that in mind, the landlord i.e. the original defendant wanted the plaintiffs to enter into a Tenancy Agreement in terms of Clause 7 of the said Agreement for Sale dated 14th July, 1981, which Agreement was to remain in force as per the said clause till the sale was completed by the Defendants as an interim measure. The plaintiffs state and submit that under these circumstances, the Tenancy Agreement dated 16th July, 1981 referred to paragraph 2 hereinbelow came into existence between the parties whereas the consideration amount of Rs. 5 lakhs (Rupees five lakhs only) were admittedly paid by the plaintiffs to the defendants only under the Agreement of Sale dated 14th July, 1981.

1F. The plaintiff states and submits that the agreement dated 14th July, 1981, provided for handing over possession of the Pilkington brothers ltd., who claimed to be statutory tenants and against whom an eviction suit was filed, were evicted. However, the dispute between Pilkington brothers ltd., and the original defendant was settled and it was mutually agreed that the sale would be completed within three months. In view thereof, the suit agreement came to be executed as the circumstances had changed and it was agreed that Rs.5,00,000/- (Rupees five lacs only) paid under the agreement of 14th July, 1981 would be treated as amount paid under the suit agreement. The plaintiff states and submits that thereafter an undated Agreement of Sale

on a stamp paper dated 20th July 1981 was entered into between Mrs.Sheroo Hooseini Doctor and the plaintiff. Here also most of the terms and conditions were more or less similar to that of the first Agreement of Sale dated 14th July 1981. It was this undated Agreement of Sale on a stamp paper of 20th July, 1981, which is the subject matter of the controversy in this Hon'ble Court.

1G. The plaintiff states and submits that the Agreement of Sale dated 14th July, 1981 could be traced out only recently and these facts could be made known to the plaintiff herein."

6. The entire paragraph 2 of the plaint is sought to be substituted by proposed paragraph 2 which reads thus:

"paragraph 2. Pursuant to the Agreement' of Sale dated 14th July, 1981, the (original defendant) Mrs.Sheroo Hooseini Doctor agreed to sell the said premises to the plaintiff and the plaintiff paid the entire consideration amount of Rs. 5 lakhs (Rupees Five Lakhs only) to the (original Defendant) Mrs.Sheroo Hooseini Doctor. However, on the date, the said Agreement of Sale dated 14th July, 1981 was executed, the plaintiff already were the sitting tenants of the said Mahendra Singh and others."

7. Having considered the matter thoughtfully, we are of the view that the rejection of the chamber summons by the learned Chamber Judge does not call for any interference. In paragraph 2 of the original plaint, the plaintiff set up the case that by Deed of Lease executed on 16.7.1981, the defendant granted monthly tenancy to the plaintiff of the premises referred to in paragraph 1 of the plaint as per the terms of lease and

that the plaintiffs kept a deposit of Rs. 5 lacs with the defendant by way of security deposit as mentioned in the Lease Agreement. The plaintiff, by way of amendment, seeks to do away with the original pleading set out in paragraph 2 and now seeks to introduce the facts by substituting paragraph 2 with the new para that pursuant to the agreement of sale dated 14th July 1981 the defendant agreed to sell the subject premises to the plaintiff and that the plaintiff paid the entire consideration of Rs.5 lacs to the defendant. The admission that pursuant to the Deed of Lease executed on 16.7.1981, the plaintiff kept a deposit in the sum of Rs.5 lacs with the defendant by way of security deposit is sought to be withdrawn. In the original plaint, there is not even a whisper that the consideration of Rs. 5 lacs under the agreement (dated 20th July, 1981) of which specific performance is sought was already paid to the defendant earlier. We are afraid, if the plaintiff is permitted to substitute paragraph 2 of the plaint as proposed, it shall result in withdrawal of the admission about security of Rs. 5 lacs deposited by the plaintiff with the defendant pursuant to the lease agreement dated 16.7.1981. This cannot be permitted.

8. Then by introduction of paragraphs 1A to 1G that relate to the agreement dated 14th July 1981 also cannot be granted as it would result in introduction of new

case.

9. The proposed amendments, if allowed, would change the nature of the Suit and also withdrawal of the admission contained in para 2 of the plaint.

10. The appeal does not deserve to be admitted and is dismissed in limine.

(R.M.LODHA,J.)

(D. G. KARNIK, J.)